IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

S.H., MOTHER OF J.M., A CHILD,

Appellant,

v. Case No. 5D21-335

DEPARTMENT OF CHILDREN AND FAMILIES,

Appellee.

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Opinion filed September 15, 2021

Appeal from the Circuit Court,
for Osceola County,
Laura Shaffer, Judge.

Richard F. Joyce, Special Assistant Regional Counsel, of Office of Criminal Conflict & Civil Regional Counsel, Casselberry, for Appellant.

Kelley Schaeffer, of Children's Legal Services, Bradenton, for Appellee.

Thomasina F. Moore, Rebecca L. Bartlett, and Sarah Todd Weitz, of Statewide Guardian ad Litem Office, Tallahassee, for Guardian ad Litem.

EDWARDS, J.

S.H., ("Mother"), appeals the adjudication of dependency as to her infant daughter, J.M. Because the trial court did not apply the correct law and its order was not based upon competent substantial evidence, we are compelled to reverse for further proceedings.

J.M. was sheltered based upon allegations that her father, Mother's paramour, G.M., had sexually abused J.M.'s half-brother, who was fourteen at the time. The shelter order and ultimately the order adjudicating J.M. dependent were based upon testimony and the trial court's finding that Mother has decreased protective capacity, because she allowed the accused abuser, G.M., to remain in the home with her and her three children, including the abuse victim, for one or two nights after the sexual abuse of her son was reported to her.

Given that "decreased protective capacity" is not a statutory ground for a declaration of dependency, the trial court's order states that there "is imminent risk of harm and perspective [sic—prospective] abuse if the child [J.M.] were returned to [M]other's custody." Although the trial court did not include a specific citation, section 39.01(14)(f), Florida Statutes (2020), states that "substantial risk of imminent abuse" is a ground for declaring a child dependent. The risk identified in this case is the possibility that G.M.

could be released from jail, return to Mother's home, and then abuse J.M. because Mother had no specific plan for safeguarding J.M. from such abuse. There was no claim or evidence that G.M. had attempted to abuse J.M. or her nine-year-old sister, who lived with Mother.

"A court's final ruling of dependency is a mixed question of law and fact and will be sustained on review if the court applied the correct law and its ruling is supported by competent substantial evidence in the record." *In re M.F.*, 770 So. 2d 1189, 1192 (Fla. 2000) (internal citations omitted). Courts are not required to wait for actual child abuse or neglect to occur before taking action by declaring a child dependent. *See Palmer v. Dep't of HRS*, 547 So. 2d 981, 984 (Fla. 5th DCA 1989). We agree with the trial court that Mother's reaction to her son's report of sexual abuse was inappropriate in several regards. However, "[t]he State of Florida does not demand perfection from its families. Instead, the State demands that children be protected from abuse and from the substantial risk of imminent abuse." *T.G. v. Dep't of Child. & Fams.*, 927 So. 2d 104, 107 (Fla. 1st DCA 2006). "Prospective" in terms of possible future abuse has been said to mean "likely to happen" or "expected," while "imminent" encompasses a narrower time frame and means "impending" and "about to occur." *See B.J. v. Dep't of Child. & Fams.*, 190 So. 3d 191,194–95 (Fla. 3d DCA 2016) (internal citations and quotations omitted). Risk of imminent harm was found in a case where the

father exhibited bizarre behavior during three months prior to petition, he referred to himself as and signed his name “God,” he was diagnosed as having a persistent mental-health condition labeled as either schizo-affective disorder or bipolar disorder, he had been Baker-Acted, heavy use of marijuana further distorted his ability to think clearly, and he had made repeated threats to DCF personnel. *See E.M.A. v. Dep’t of Child. & Fams.*, 795 So. 2d 183,184 (Fla. 1st DCA 2001). Expert testimony predicted he could harm the young children at any time. *Id.*

In *Richmond v. Department of Health & Rehabilitative Services*, 658 So. 2d 176 (Fla. 5th DCA 1995), this Court found that adjudicating the child dependent based upon imminent risk of harm was appropriate. Although the mother had not previously abused, abandoned, or neglected the child, the mother had serious mental health problems including thoughts that she was being surveilled or threatened by various governmental agencies, lasers from outer space, and the KKK and complained of other threats to her safety which led to her keeping a loaded handgun nearby where her child could access it. *Id.* at 177. While the trial court found no proof of prior neglect, relatives and others testified that the mother often did not properly feed or clothe the child and misidentified which medication was intended for the mother versus child. *Id.* Substantial risk of harm was also found in *Palmer*, a termination of parental rights case, where the father was an untreated

pedophile. 547 So. 2d at 984.

One could postulate or speculate that *if* G.M. were released from jail and *if* Mother allowed him to return to her home where J.M. was living, there would be potential danger to J.M. However, that potential danger does not rise to the level of a "substantial risk of imminent abuse." *See* § 39.01(14)(f), Fla. Stat. There was no evidence before the trial court that G.M.'s release from jail was "impending" or "about to happen," or that the prospective harm is as predictable as the risks discussed in *Palmer, E.M.A.*, or *Richmond.* The applicable statutes define whether a child is dependent, and here we are compelled to find that J.M. was not dependent based upon the evidence presented during the adjudicatory hearing.

Accordingly, we reverse the adjudication of dependency and remand to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

EVANDER and WOZNIAK, JJ., concur.